In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 17

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES D. KNOX

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

Before responding to the allegations contained in appellee's brief, we reiterate that only one issue is properly before this Court in reviewing the district court's dismissal of the indictment. That issue is whether assertion of the privilege against self-incrimination provides a complete defense to the charge that appellee falsified the registration forms he filed, in violation of 18 U.S.C. 1001. Many of the claims raised in appellee's brief relate to issues which may be developed and urged at trial; this appeal does not, however, provide the appropriate context for their resolution. See *United States* v. *Fruehauf*, 365 U.S. 146.

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1. Counts five and six do not, as appellee asserts (App. Br., p. 5), simply charge a failure to answer questions on the wagering tax forms. Rather, Count five states that appellee wilfully and knowingly caused a false statement to be made on a wagering tax registration statement (Form 11–C), filed on October 14, 1965, in that he misrepresented and understated the number of employees or agents engaged in receiving wagers on his behalf. The charge obviously refers to questions 5(b) and 5(c) on this form, requesting the applicant to state the number of such employees or agents and then list their names, addresses and special tax stamp numbers; at a trial on this charge the government would undertake to establish that appellee wrote "none" in reply to both subquestions (A. 11). On the following day appellee filed another Form 11–C and this time indicated that he had "3" employees or agents, and listed the names and addresses of three individuals: Foster, Bridges and Nichols (A. 12). In Count six, it is alleged, and the government would seek to prove at trial, that this number of employees was false (A. 4–6).

The charges in Counts five and six are clearly distinguishable from those in the cases cited by appellee which hold that the *absence* of a response to a question will not support a charge of perjury. Here a reply was in fact given; the spaces were not left blank. Had they been left blank, the district director might have regarded the forms as not having been fully executed, but he could not have been misled into believing that appellee had no employees on October 14, 1965, and only three on the following day.

An affirmative response, even the word "none", shows a conscious consideration of the matter sought by the question and a deliberate reply, which the government alleges to have been false. See *United States* v. *Zambito*, 315 F. 2d 266 (C.A. 4), certiorari denied, 373 U.S. 924.

As appellee notes (App. Br., p. 7), a few courts have fashioned an exception to the broad coverage of the False Statement Act in the case of "no" replies to questions propounded by federal agents in the course of an investigation of an individual regarded as a potential defendant. See *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8); *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5); contra, *Tzantarmas* v. *United States*, 402 F. 2d 163 (C.A. 9), certiorari denied, 394 U.S. 966; *United States* v. *Adler*, 380 F. 2d 917 (C.A. 2), certiorari denied, 389 U.S. 1006. Assuming the correctness of the "exculpatory no" exception, it manifestly is inapplicable to Count six, where appellee listed three employees. The exception is, moreover, equally inappropriate to control the disposition of Count five. Those jurisdictions which have adopted this exception to the broad scope of the term "statement" have restricted its application to false denials made to federal agents in the course of an investigation directed against a potential defendant who did not initiate the contact with the government and was not seeking any form of governmental privilege or benefit (see *Paternostro* v. *United States, supra*, 311 F. 2d at 309). Appellee's situation does not fall within that limited exception. See also *Blake* v. *United States*, 323

F. 2d 245 (C.A. 8); *Ogden* v. *United States*, 303 F. 2d 724 (C.A. 9); *Frasier* v. *United States*, 267 F. 2d 62 (C.A. 1); *Pitts* v. *United States*, 263 F. 2d 353 (C.A. 9), certiorari denied, 360 U.S. 935.

2. Appellee's suggestion (App. Br., p. 8) that he was entitled to falsify his tax forms because he was compelled by law to file them is untenable. The "coercion" referred to by appellee did not involve any custodial interrogation, or the use of physical intimidation or psychological trickery threatening the reliability of the fact-finding process. Rather, it involved only the impersonal, uniformly applied requirement, addressed to the public at large, that individuals who conduct a wagering business pay a tax and submit certain information to assist in the proper administration of the taxing scheme. See *Mackey* v. *United States*, 411 F. 2d 504 (C.A. 7).

The "rock-whirlpool" dilemma which appellee seeks to invoke (see App. Br., p. 8) was not relevant to his determination whether to give true or inaccurate responses to the questions on the tax forms. Such a dilemma arises instead with regard to the decision whether to file (and face possible prosecution under State gambling laws) or not to file (and face possible prosecution under 26 U.S.C. 7203). Had appellee not filed, he would plainly have had a complete defense to a criminal prosecution under 26 U.S.C. 7203 under *Marchetti-Grosso*.[1] Correspondingly, had he filed accu-

[1] The government recognized this fact by stating in the district court that it would not pursue the charges in the indictment relating to appellee's complete failure to file and by not seeking to appeal the dismissal of those counts.

rate information and, as a result, been subjected to State prosecution, he would also be in a position, at least presumably, to assert the privilege as a complete defense. Cf. *Malloy* v. *Hogan,* 378 U.S. 1; *Murphy* v. *Waterfront Commission,* 378 U.S. 52. But he cannot assert that he had a license to lie.

3. There is no doubt that the Internal Revenue Service has the authority to require the filing of tax returns. This authority has not been defeated in the matter of wagering tax returns by *Marchetti-Grosso,* for this Court specifically stated that it was not invalidating the wagering tax structure (*Grosso* v. *United States,* 390 U.S. 62, 69–70). Accordingly, the jurisdictional element of the indictment against appellee is fully justified. Indeed, there has never been any reason to believe that "the administration of the tax laws and the collection of taxes is not one of the processes of government which the (false statement) statute was designed to protect," and that "making false statements about taxes to the representatives of the Treasury is not the kind of interference and obstruction which the statute was intended to prevent." *United States* v. *McCue,* 301 F. 2d 452, 455 (C.A. 2), certiorari denied, 370 U.S. 939. See also *Knowles* v. *United States,* 224 F. 2d 168, 172 (C.A. 10).

Nor is an indictment under 18 U.S.C. 1001 invalid because a defendant may be able to establish that he derived no personal benefit from the deceptive practice. The False Statement Act is intended to protect the authorized functions of government agencies from the filing of fraudulent information whether or not

pecuniary or property losses result. *United States* v. *Gilliland,* 312 U.S. 86, 92–93. It is perhaps arguable that the absence of benefit might constitute some defense to the charge, but this appeal is not the appropriate context to resolve that question. See *United States* v. *Fruehauf, supra.* In any event, substantial pecuniary benefits (*i.e.,* reduced tax obligations) can be derived from fraudulently understating the number of employees in a gambling operation. That conduct, therefore, might well obstruct the proper administration of a valid taxing measure (*United States* v. *Zambito,* 315 F. 2d 266, 269 (C.A. 4), certiorari denied, 373 U.S. 924), and thus falls within the scope of 18 U.S.C. 1001.

CONCLUSION

For the foregoing reasons and the reasons set forth in our principal brief, the judgment below should be reversed and Counts five and six of the indictment ordered reinstated.

Respectfully submitted.

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